APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT, DIVISION ONE

BENETTA BUELL-WILSON and BARRY S. WILSON,

Plaintiffs, Respondents, and Cross-Appellants,

v.

FORD MOTOR COMPANY and DREW FORD,

Defendants, Appellants, and Cross-Respondents.

On Appeal From The San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

APPELLANTS' OPENING BRIEF

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2. The punitive damages award is excessive under *State Farm* and California law

Even if liability for punitive damages were not otherwise precluded, the *$75,000,000* punitive judgment would have to be set aside in its entirety as grossly excessive as a matter of California law and the Due Process Clause of the Fourteenth Amendment. This punishment—which began as an outrageous ***$246,000,000*** punitive damages verdict—further confirms that the jury was motivated by anger, passion, prejudice, and bias. The award here is simply off the charts. It is more than three times larger than the largest punitive damages award ever upheld in California in an automotive products liability case in a published opinion. *See Romo*, 113 Cal.App.4th 738 ($23,723,287 award where accident involved three deaths and three other seriously injured individuals). As of 1997, the year of plaintiffs' vehicle, the largest automobile products liability punitive damages award upheld in a published California decision was $4,000,000, or roughly *1/19th* of the punitive damages here. *See Hasson*, 32 Cal.3d 388. A new trial is the only way to cure this defect in the proceedings. *See Sabella*, 70 Cal.2d at 316 n.2; *Wells*, 793 F.2d at 683-84.

If the compensatory damages award is upheld, then the punitive damages award must be set aside because of the large, clearly punitive noneconomic damages award. "[L]arge compensatory damage awards . . . have a strong deterrent and punitive effect in themselves." *Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th at 424 (Brown, J., concurring); *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1106 (same). Heaping punishment on top of punishment by allowing the separate punitive damages award to stand would be excessive and unconstitutional.

Moreover, if the compensatory damages award is reduced, then the punitive award must likewise be reduced to maintain a proper ratio. As the Supreme Court stated in *State Farm*, where compensatory damages are large (and the Court deemed a $1 million compensatory award large), punitive damages should not exceed the compensatory award. *State Farm*, 538 U.S. at 424-28.

Either way, Ford is entitled to a new trial regarding punitive damages, or at the very least a substantial remittitur.

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

BENETTA BUELL-WILSON et al.,

Plaintiffs and Respondents,

v.

FORD MOTOR COMPANY, et al.,

Defendants and Appellants.

After A Decision By The Court of Appeal,
Fourth Appellate District, Division 1,
Case Nos. D045154, D045579

San Diego County Superior Court
The Honorable Kevin A. Enright
No. GIC800836

PETITION FOR REVIEW

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ISSUES PRESENTED FOR REVIEW

1. In a product liability design case, is evidence of industry standards and custom, including the product's real-world safety performance relative to comparable products, relevant to the issues of design defect and punitive damages?

2. In a product liability design case, can malice within the meaning of Civil Code section 3294 be deemed established by clear and convincing evidence against a motor vehicle manufacturer where (a) the vehicle complies with applicable federal standards that are required by law to "meet the need for motor vehicle safety," (b) the federal government has rejected the precise standards used by plaintiffs' expert to condemn the product as defective, (c) the vehicle is as safe or safer than comparable vehicles, and (d) there is an objectively reasonable, genuine debate over whether the product is defective?

3. In evaluating punitive damages pursuant to the federal due-process *de novo* review standard, may a court (a) apply the state-law substantial evidence test to presume that the jury made findings it did not expressly make and to disregard objective factors mitigating reprehensibility, and (b) punish the manufacturer's lawful conduct, including its sale of a product to third parties before the court, even where the manufacturer prevailed in the previous eleven cases involving that same product?

* * *

these important issues.[5]

At a minimum, this Court should grant and hold this case pending the Court's decision in *City of Hope v. Genentech*, S129463, which presents some of the same punitive damage liability issues. *See, e.g.*, Brief of the Product Liability Advisory Counsel, as *amicus curiae* therein.

III.

This Court Should Grant Review To Clarify The Standards For Scrutinizing Punitive Damages For Excessiveness Under The Due Process Clause In The Product Liability Context.

Even as reduced, the $55 million punitive damage award remains the largest single-accident personal injury punitive damage award ever affirmed on appeal in California history. The Court of Appeal's decision upholding this punishment contradicts *State Farm*, *supra*, 538 U.S. 408, and *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, and the decisions of this Court and other courts, and it will sow confusion and injustice unless this court grants review.

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5. Review is also needed because the Court of Appeal's interpretation of Section 3294 renders it unconstitutionally vague as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999); *Connally v. General Constr. Co.*, 269 U.S. 385, 391-92 (1926); *Southwestern Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915); *Hewitt v. State Bd. of Med. Exam'rs*, 148 Cal. 590, 592-93 (1906).

Appendix B

A. Misinterpretation Of The De Novo Review Standard.

The Court of Appeal incorrectly interpreted the "[e]xacting" de novo standard of review of punitive damages awards (*see, e.g.*, State Farm, supra, 538 U.S. at 418), which, as this Court has held, requires courts to, among other things, "mak[e] an independent assessment of the reprehensibility of the defendant's conduct" with deference only to the jury's "express" findings and without "presum[ing]" the jury made other findings not stated in the verdict. *Simon v. San Paolo U.S. Holdings Co., Inc.*, 35 Cal. 4th 1159, 1172-73 (2005). The need for searching review is compelling here since the court below found that the jury acted out of passion and prejudice, not fairness and neutrality, during the first phase of the trial and those improper motives may well have tainted the jury's original $246 million punitive verdict. *See State Farm, supra*, 538 U.S. at 417 [discussing danger of jury bias].

The jury made only one express factual finding specifically relating to punitive damages—that Ford acted with "oppression, fraud, or malice"—yet the Court of Appeal assumed that the jury agreed with plaintiff's every accusation, and refused to consider any Ford evidence—even uncontradicted evidence. Slip op., pp.9, 57, 58-61. The court, in conducting its due process review, simply cited back to and adopted the same extraordinarily deferential view of the evidence that it used when applying the state-law substantial evidence test to the jury's finding of malice. *See* n.1, *ante*.

Consequently, while the court purported to be applying de novo review, it deferred to unstated "findings of historical fact" that it presumed the jury had made (slip op., p.57),

wholly distorting its evaluation of the reprehensibility of Ford's conduct. For example, the court stated that the purported evidence of "high" reprehensibility was "primarily adduced through Ford's own internal memoranda and correspondence" (*id.*, pp.59, 61), but it disregarded what those documents actually say. *Compare*, *e.g.*, AA2518-2519 with slip op., p.12. The court referred to tests the Explorer failed (slip op., p.12), ignoring plaintiffs' concessions and the evidence that these tests involved prototype, not production, vehicles. *See*, *e.g.*, Respondent's Brief, p.43, fn.33. The court asserted that the "higher the [stability index] rating the more stable the vehicle" (slip op., p.10) ignoring plaintiffs' own expert testimony and NHTSA's conclusions that numerous other factors affect vehicle stability. RT3712:22-3721:28; AA605, 607 [52 Fed. Reg. 49033, 49035 (Dec. 29, 1987)]. The court asserted that "Ford knew before the Explorer was released for sale that the same instability characteristics [in the Explorer] led to serious injuries to Bronco 11 drivers" (slip op., p.46), ignoring documents written by Ford engineers before the Explorer was released showing their belief that "'[w]hile the Bronco 11 has FARS statistics in the 'middle-to-poor' range, the Explorer is expected to be 'near B-1-C'" [Best In Class]." AA2482; *see also*, *e.g.*, AA2518-2519. And the court relied on plaintiffs' expert testimony that occupants are injured in rollovers "only when the roof crushes" (slip op., p.14), ignoring the undisputed fact that a substantial body of scientific evidence strongly suggests that increasing roof strength does not reduce injuries. *See*, p.11, *ante*.

B. Misinterpretation Of The Reprehensibility Guidepost.

As a result of its misunderstanding of *de novo* review, the Court of Appeal failed to take into account the multiple objective factors—such as industry standards and custom, federal regulatory decisions, and the genuine debate on these complex design issues—discussed above in Sections I and II, ante. Even if these factors do not completely bar punitive damages, they are relevant to gauging the reprehensibility of Ford's conduct. *BMW*, *supra*, 517 U.S. at 565, 570-71, 577-78 [considering defendant's compliance with statutes in other states in evaluating reprehensibility]; *Clark v. Chrysler Corp.*, 436 F.3d 594, 602 (6th Cir. 2006) [cutting $3 million punitive award to approximately $470,000 in design defect wrongful death case where the evidence established at most "a good-faith dispute over whether B-pillar testing is necessary"].)

The Court of Appeal incorrectly found Ford's conduct "more reprehensible" because it was "repeated and not an isolated incident" (slip op., p.60), based on the fact that Ford mass-marketed the Explorer as well as the Bronco II. This ruling contradicts *State Farm*, as well as *Johnson v. Ford Motor Co.*, 35 Cal. 4th 1191 (2005), because the court punished Ford for conduct toward third parties not before the court and their "hypothetical claims," "without ever proving the specifics of those 'hypothetical claims.'" *Id.* at 1210 (quoting *State Farm*, *supra*, 538 U.S. at 423).

As the record reflects but the Court of Appeal did not mention, Ford won the eleven prior trials alleging defects in the Explorer. AA11541237. By simply assuming that every sale of the Explorer is an example of "repeated" misconduct the court effectively nullified those eleven prior victories

(and others since), and inflicted punishment based on conduct exonerated by other juries.[6] The court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional punitive damages for marketing the Explorer. *See Johnson*, 35 Cal. 4th at 1209-10; *see also Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004).

If reprehensibility is properly evaluated, the necessary conclusion is that Ford's conduct was not remotely reprehensible. The proper evaluation of alleged reprehensibility is a recurring and important issue in product liability cases that deserves this Court's attention. At a minimum, this Court should grant and hold this case pending the Supreme Court's decision in *Philip Morris USA v. Williams*, 127 P.3d 1165 (Or. 2005) (upholding $79 million punitive award), *cert. granted May 30, 2006*, No. 05-1256, __ U.S.__ [126 S. Ct. 2329]; *cf. Bullock v. Philip Morris USA, Inc.*, S143850.

CONCLUSION

The petition should be granted.

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6. Since the verdict here, Ford has prevailed in the majority of Explorer trials.